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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 v.
10 JONATHON ORTINO,
11 Defendant.

Case No. [19-cr-00142-WHO-1](#)

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13 **ORDER DENYING MOTION TO**
14 **SUPPRESS STATEMENTS**

15 Re: Dkt. No. 30

16 **INTRODUCTION**

17 Defendant Johnathon Ortino, a Department of Homeland Security (DHS) employee with
18 Customs and Border Patrol (CBP), moves to suppress statements he made to the DHS Office of
19 Inspector General (“DHS OIG”) because DHS OIG officials interviewed him without advising
20 him that he could assert his right to remain silent without being penalized by termination or
21 discipline in accordance with *Garrity v. New Jersey*, 385 U.S. 493 (1967). They did advise him of
22 his *Miranda* rights, but Ortino argues that both *Miranda* and *Garrity* warnings were required.

23 I find that Ortino’s belief that he was compelled to answer DHS OIG’s questions under
24 threat of termination is not objectively reasonable. DHS Management Directive 810.1 prohibits
25 CBP from disciplining an employee who refuses to cooperate with DHS OIG when the employee
26 is the subject of an investigation that could lead to criminal prosecution. Ortino knew that he was
27 facing criminal consequences prior to the interview: he surrendered his service weapon, was
28 placed under arrest, and received his *Miranda* warning. The government did not implicitly or
 explicitly compel him to answer questions. His motion to suppress is DENIED.

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BACKGROUND

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I. FACTUAL BACKGROUND

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A. Underlying Investigation

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Ortino was a DHS CBP officer and an elected president of the National Treasury Employees Union (“Union”) Chapter 165. Superseding Indictment [Dkt. No. 13] ¶ 1. As Union president, he had an obligation to file the Union’s Form LM-3 Labor Organization Annual Report (“Form LM-3”) with the Department of Labor (“DOL”). *Id.* ¶ 2. According to the Superseding Indictment, Ortino used the Union’s bank account for his own private expenses and made online transfers from it to his and his other associates’ private bank accounts. *Id.* ¶ 17. He allegedly filed a false Form LM-3 in 2014, 2015, and 2016 for the Union that concealed this activity. *Id.* ¶ 10.

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Another CBP officer defeated Ortino in the Union’s presidential election on September 12, 2017. Opposition to Motion to Suppress (“Oppo.”) [Dkt. No. 33] 3. According to the government, this led to Ortino’s confrontations with Anad Muni, the newly-elected Union president, and Bryan Vann, the Union’s former-vice president while he was president. *Id.* Ortino allegedly threatened Vann at a bar, shoved Vann to provoke a fight, and when Vann refused to hit him, called Vann a racial slur. *Id.* CBP issued an internal “memorandum of instruction,” informing Ortino that his confrontation with Vann was unacceptable and should not be repeated. *Id.*; Declaration of Richard DiNucci in Support of Opposition (“DiNucci Decl.”) [Dkt. No. 33-2] ¶ 2.

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Ortino’s supervisor, Port Director Richard DiNucci, claims that Ortino told him that he was concerned about losing work opportunities because of his confrontation with Vann. DiNucci Decl. ¶ 3. DiNucci contends that Ortino asked for a meeting several times, and that DiNucci coordinated the date, time and location of the meeting with DHS OIG Special Agent Janet Roberson because he knew that she also wanted to speak with Ortino. *Id.* ¶¶ 4–5.

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Ortino asserts that he did not initiate the meeting request and rather, on March 31, 2019, DiNucci directed him to appear for a meeting on April 2, 2019 to “get the air cleared on the Vann thing.” Declaration of Johnathon Ortino in Support of Motion to Suppress (“Ortino Decl.”) [Dkt. No. 32] ¶ 3 & Ex. A (email exchange between Ortino and DiNucci). Ortino asked if there was any

1 cause for concern and whether he should bring a union representative. *Id.* DiNucci replied, “No
2 need for a rep unless you want one. I wanted to clear that up face to face.” *Id.* Ortino notes that
3 this email exchange occurred just a few days after the government obtained its initial indictment
4 under seal, charging Ortino with three counts of false statement. Indictment [Dkt. No. 1].

5 **B. Meeting with Supervisor DiNucci**

6 Upon his arrival, Ortino claims that DiNucci informed him that the real reason he was
7 there was to talk to DHS OIG and DOL agents. Ortino Decl. ¶ 4. He responded that he did not
8 want to talk to the agents that day because he had to take care of other things before leaving for
9 vacation the next day. *Id.* He states that he requested rescheduling the meeting to the following
10 week but DiNucci told him that he “had to talk to the agents that day, and that [he] could not
11 leave.” *Id.* DiNucci told him to “be honest” with the agents.

12 DiNucci remembers the conversation somewhat differently. He says that he “explicitly
13 told [Ortino] that he did not have to talk if he did not want to do so and that it was his choice
14 whether or not to talk to the OIG.” DiNucci Decl. ¶ 10. He also told him that “if he did decide to
15 talk he should tell the truth and that he should get a lawyer if he wanted one.” *Id.* He contends
16 that he never told Ortino that he had to cooperate with DHS OIG and never threatened to punish
17 Ortino if he did not cooperate with DHS OIG. *Id.* ¶ 9.

18 Both parties agree on the sequence of events that followed. DiNucci asked Ortino to
19 surrender his service weapon and took him to a different room, where three agents were waiting.
20 Ortino Decl. ¶ 5; DiNucci Decl. ¶ 8. The three agents told Ortino he was under arrest and read
21 him his *Miranda* rights. *Id.* DHS OIG Special Agent Janet Roberson and DOL Special Agent
22 Laura Lawrence then arrived and began questioning him. *Id.*

23 **C. DHS OIG Interviews Ortino Without Providing A *Garrity* Warning.**

24 Ortino claims that Roberson also read him at least part of his rights and began questioning
25 him while Lawrence took notes on a laptop computer and occasionally asked questions. Ortino
26 Decl. ¶ 5. At some point during the questioning, Roberson asked Ortino to sign a *Miranda* waiver,
27 which he did. *Id.* That form advised Ortino that he had the right to remain silent and the right to
28 an attorney, and that he may waive both of these rights and “answer questions or make a statement

1 without consulting an attorney if you so desire.” Declaration of Christina E. Urhausen in Support
2 of Motion to Suppress (“Urhausen Decl.”) [Dkt. No. 31], Ex. I (*Miranda* waiver signed by Ortino
3 on April 2, 2019). The agents questioned him about his employment history, his activities as
4 Union president, his banking habits, an item-by-item review of expenses reflected in the union
5 bank account, withdrawal and transfers, debit card purchases, the process of preparing forms for
6 DOL and other topics. Mot. 7; Urhausen Decl., Ex. J (DOL interview report of Ortino).

7 Roberson states that when Ortino signed the *Miranda* waiver, he told both her and
8 Lawrence that he “just wants to be honest” and to explain everything. Declaration of Janet
9 Roberson in Support of Opposition (“Roberson Decl.”) [Dkt. No. 33-3] ¶ 4. She also asserts that
10 she and Lawrence told him “several times that he did not have to continue his post-arrest interview
11 or answer [their] questions and that he could call an attorney,” but he “always voluntarily chose to
12 continue his interview.” *Id.* ¶ 7. She contends that Ortino never asked if he would face any
13 employment consequences. *Id.* ¶ 8. Ortino allegedly said that he was “ashamed of what happened
14 and why it happened” and that the wire transfers from the Union account were his “fault” not the
15 other CBP employees. *Id.* ¶¶ 9–10. He allegedly pleaded, “You guys have no idea what it feels
16 like to go to bed every night thinking about this and waking up every morning thinking about
17 this.” *Id.* ¶ 10.

18 The agents did not give him the *Garrity* warning. They did give *Garrity* warnings to four
19 other CBP employees interviewed about this matter. *See* Urhausen Decl., Exs. B, D–F (DOL
20 interview reports of Vann, Kobashigawa, Le, and Papageorge). Ortino notes that the agents
21 arrived late to his interview because they were interviewing another CBP employee who received
22 a *Garrity* warning. *Id.*, Ex. C (DOL interview report of Lewin, dated April 2, 2019).

23 **D. DHS OIG’s Instruction on *Garrity* Warnings**

24 **1. DHS OIG Special Agent Handbook**

25 The *Garrity* form that the agents allegedly used for other CBP employees comes from the
26 DHS OIG Special Agent Handbook. Urhausen Decl., Ex. G (DHS OIG Special Handbook, 2007–
27

1 2017) (hereinafter “Handbook”) at Chapter 10, Page 1).¹ The “INV Form 27, Federal Employee
2 Warning Form (Garrity)” expressly warns a DHS employee being questioned that:

3 Although you would normally be expected to answer questions
4 regarding your official duties, in this instance you are not required to
5 do so. Your refusal to answer solely on the grounds that your answer
6 may tend to incriminate you, will not subject you to disciplinary
7 action.

8 Handbook at Chapter 10, Page 14, Exhibit 10-3. Ortino argues that the agents were required to
9 provide him with a *Garrity* warning because the Handbook states that “all employee subjects will
10 initially be provided with *Garrity* warnings.” Mot. 6.

11 The Handbook recognizes that “DHS employees are generally required to assist
12 investigators in the performance of their official duties,” and “can be compelled to cooperate”
13 under the Inspector General Act, 5 U.S.C.A., App. 3, the DHS Management Directive 810.1, and
14 the Secretary’s April 8, 2008 memorandum on cooperation with the OIG. Handbook at Chapter
15 10, Page 1. However, the DHS Management Directive states that employees will “[b]e subject to
16 disciplinary action for refusing to provide documents or information or to answer questions posed
17 by investigating officials . . . *unless questioned as the subject of an investigation that can lead to
criminal prosecution.*” Urhausen Decl., Ex. L (copy of DHS Management Directive 810.01 at
18 Section V.B.5) (emphasis added).

19 The Handbook also advises that “a DHS employee who has foreseeable criminal exposure
20 will not be compelled under that Standards of Conduct to cooperate in an investigation. Any
21 compelled statement obtained would not be admissible in a criminal proceeding against the
22 employee.” Handbook at Chapter 10, Page 2. It recognizes that it is “beyond the scope of this
23 manual to list and explain every circumstance and condition under which the advisement of rights
24 comes into play,” but provides general guidelines about the minimum requirements in different
25 circumstances. Handbook at Chapter 10, Page 6. Pertinent to the facts in this case, the Handbook

26 ¹ Ortino’s exhibit to the court is a copy of the DHS OIG Special Agent Handbook in effect from
27 2007–2017 that DHS produced pursuant to a Freedom of Information Act request and that appears
28 online. Mot. 5, n.1. Ortino states that he made a discovery request to the government for the
version of the Handbook in effect at the time of his interview in April 2019. *Id.* The parties are
continuing to meet and confer over the production of the current version. *Id.*

1 provides that:

- 2 • In a situation where the “[s]ubject is in custody or under arrest and is an employee,” the
3 Handbook finds “Miranda rights [are] required.”
4 • In a situation where the “[s]ubject is in custody on a matter other than what you are
5 investigating, is an employee, and has foreseeable criminal exposure in your
6 investigation,” the Handbook finds both “Garrity warning. . . [and] Miranda rights [are]
7 required.”
8 • In a situation where the “[s]ubject is not in custody but is a DHS employee and has
9 foreseeable criminal exposure,” the Handbook finds a “Garrity warning is required.”

10 *Id.* at Chapter 10, Page 7. As Ortino points out in his motion, the Handbook could be read to
11 exclude employees in custody from receiving *Garrity* warnings, unless they are in custody “on a
12 matter other than what [the agent is] investigating.” Mot. 9. In this case, it appears that Agent
13 Roberson followed the Handbook’s guidance – Ortino was only given a *Miranda* warning, and not
14 an additional *Garrity* warning, because he was in custody on the matter for which DHS OIG was
15 investigating him. The other CBP employees were only given *Garrity* warnings because they
16 were not in custody.

17 **2. Assistant Attorney General Memorandum**

18 Ortino cites additional evidence that he argues shows that agents were required to give him
19 a *Garrity* warning. On May 6, 2005, Assistant Attorney General (“AAG”) Christopher A. Wray
20 issued a memorandum entitled “The Increasing Role of the Offices of Inspector General, and
21 Uniform Advice of Rights Forms for Interviews of Government Employees.” Urhausen Decl., Ex.
22 A (AAG Wray Memorandum). It recommended that OIG agents provide *Garrity* warnings in all
23 interviews with employees, and to provide an additional *Miranda* warning in custodial interviews:

24
25 [W]hen a federal employee is interviewed during the course of an
26 investigation being conducted by an Office of Inspector General, the
27 agents should provide the employee with an advice of rights form that
28 is designed to preserve the government’s ability to use the employee’s
statements by advising the employee that the interview is voluntary
and that the employee will not be disciplined solely for refusing to
answer questions . . . In custodial interviews, of course, the employee
should also be provided with *Miranda* warnings.

Id.

Subsequently, on January 11, 2006, AAG Alice S. Fisher, issued another memorandum to clarify the AAG Wray Memorandum. Oppo., Ex. A (AAG Fisher Memorandum). AAG Fisher stated that “the Wray memorandum encouraged the use of *Garrity* warnings whenever inspector general agents conduct interviews of government employees,” in order to minimize the risk of “taint[ing] the entire investigation or prosecution.” She explained:

The Wray memorandum was not intended to undermine or change the existing authority of the Offices of Inspector General to exercise their professional judgment regarding specific circumstances under which *Garrity* warnings must be given.

Id. That is why, the government argues, the DHS OIG Special Agent Handbook suggests that a *Garrity* warning is not needed when a DHS employee is in custody on the matter for which they are investigating. Ortino responds that the government's interpretation of *Garrity* misapplies the law and is not binding. Mot 10.

II. PROCEDURAL HISTORY

On March 26, 2019, the government filed the initial indictment against Ortino for three counts of false statements arising out of the DOL forms he submitted as Union president. Indictment [Dkt. No. 1]. On June 4, 2019, after agents interviewed him on April 2, 2019, the government obtained a Superseding Indictment against him and added three wire fraud charges to the prior false statement charges. Superseding Indictment [Dkt. No. 13].

On October 3, 2019, Ortino moved to suppress the statements he made at the interview, along with any evidence derived from those statements. I heard oral argument on November 14, 2019.

LEGAL STANDARD

I. FIFTH AMENDMENT PRIVILEGE

As a general rule, “[i]f [an individual] desires the protection of the [Fifth Amendment] privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the Amendment.” *United States v. Saechao*, 418 F.3d 1073, 1077 (9th Cir. 2005) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)) (internal quotation marks omitted).

1 There are, however, exceptions to this rule. The Supreme Court has held that if an individual is
2 subjected to a practice that “den[ies him] . . . a free choice to admit, to deny, or to refuse to
3 answer,” then any statement he makes is considered involuntary and cannot be used in a criminal
4 proceeding. *Garner v. United States*, 424 U.S. 648, 657 (1976) (internal quotation marks and
5 citation omitted). In these cases, the Fifth Amendment is considered “self-executing,” and an
6 individual does not need to invoke it in order to have his admissions suppressed in an ensuing
7 criminal prosecution. *Id.*

8 One instance in which an individual is held to have been denied a free choice to admit, to
9 deny, or to refuse to answer is what the Supreme Court refers to as a “penalty situation.”
10 *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). If an individual’s refusal to answer
11 incriminating questions subjects him to a penalty, then the Fifth Amendment is self-executing and
12 any statements made under threat of such penalty are inadmissible. *Saechao*, 418 F.3d at 1077.

13 The Supreme Court in *Garrity* held that “loss of job” is a “penalty” that cannot be imposed
14 on the exercise of the Fifth Amendment privilege. *Garrity v. New Jersey*, 385 U.S. 493 (1967).
15 In *Garrity*, a state employer questioned its employees and informed them of their right to remain
16 silent—and that if they exercised it, they would be fired. *Id.* at 494. Faced with the choice “either
17 to forfeit their jobs or incriminate themselves,” the employees confessed. *Id.* at 495, 497. The
18 Court held that the state may not put its employees in this penalty situation and reversed their
19 convictions. *Id.* at 497–98.

20 The *Garrity* Court reasoned that the choice between incriminating oneself and suffering the
21 threatened penalty, such as loss of a job, is “the antithesis of free choice to speak out or to remain
22 silent.” 385 U.S. at 497.² Accordingly, the *Garrity* rule, like *Miranda*, is prophylactic. *Chavez v.*
23 *Martinez*, 538 U.S. 760, 768 (2003) (plurality opinion) (observing that the “immunity [secured
24 by *Garrity*] is . . . a prophylactic rule we have constructed to protect the Fifth Amendment’s
25 right”). Where the government has created a penalty situation, the inquiry is no longer whether

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28 ² The “loss of job, loss of state contracts, loss of future contracting privileges with the state, loss of
political office, loss of the right to run for political office in the future, and revocation of probation
all are ‘penalties’ that cannot be imposed on the exercise of the privilege.” *United States v.*
Frierson, 945 F.2d 650, 658 (3d Cir. 1991) (collecting cases).

1 the criminal defendant asserted his privilege when he was questioned (itself a proxy for whether
2 his answer was compelled); instead, the privilege is said to be “self-executing” and may be
3 claimed after the fact. *Murphy*, 465 U.S. at 436.

4 **II. THE GARRITY RULE**

5 For the *Garrity* rule to apply, the government must have created a penalty situation—it
6 must have made some sort of threat. *Murphy*, 465 U.S. at 435. A penalty situation is created if
7 there is a “reasonable basis for concluding that [the state] attempted to attach an impermissible
8 penalty to the exercise of the privilege against self-incrimination.” *Id.* at 437. A state creates a
9 classic penalty situation if it “expressly or by implication” suggests “that invocation of the
10 privilege would lead” to a penalty. *Id.*

11 Courts have applied two different legal standards to determine whether a defendant is
12 coerced into waiving his Fifth Amendment rights – the *Indorato* test and the subjective/objectively
13 reasonable belief test. The First Circuit in *United States v. Indorato*, held that a *Garrity* violation
14 occurs when (1) the person being investigated is *explicitly told* that failure to waive his
15 constitutional right against self-incrimination will result in his discharge from public employment .
16 . . and (2) there is a statute or municipal ordinance mandating such procedure.” 628 F.2d 711, 716
17 (1st Cir. 1980) (emphasis added). The government argues that this test is applicable, but the
18 *Indorato* decision predates the Supreme Court’s decision in *Murphy* in 1984, in which the Court
19 held that a classic penalty situation can arise either “expressly or by implication.” *Murphy*, 465
20 U.S. at 435 (emphasis added); Oppo. 8. The Ninth Circuit has also rejected argument that penalty
21 only arises when the state *expressly* announces a penalty, finding that such an interpretation “is
22 contrary to the plain language of the Supreme Court’s decision in *Murphy*.” *Saechao*, 418 F.3d at
23 1079.

24 The relevant test here is the subjective/objectively reasonable test. For statements to be
25 protected under *Garrity*, a public employee “must have in fact believed [the] statements to be
26 compelled on threat of loss of job and this belief must have been objectively reasonable.” *United*
27 *States v. Frederick*, 842 F.2d 382, 395 (D.C. Cir. 1988); *see also United States v. Trevino*, 215 F.
28 App’x 319, 321–22 (5th Cir. 2007); *United States v. Vangates*, 287 F.3d 1315, 1321–22 (11th Cir.

1 2002).

2 DISCUSSION

3 I. SUBJECTIVE BELIEF

4 The Supreme Court in *Murphy* undertook both a subjective and objective analysis but
5 expressly declined to decide whether one or the other or both were necessary. 485 U.S. at 437
6 (holding that there was no penalty situation regardless “[w]hether [the Court] employ[ed] a
7 subjective or an objective test”). The Ninth Circuit in *Saechao* barely discussed the subjective
8 inquiry, and in *Bahr* elided it entirely. *See Saechao*, 418 F.3d at 1077; *United States v. Bahr*, 730
9 F.3d 963, 966 (9th Cir. 2013).

10 In his declaration, Ortino states that he believed that he would have been subject to
11 discipline if he refused to cooperate with OIG and that he was mandated to cooperate with OIG
12 under workplace policies that applied to him. Ortino Decl. ¶¶ 3–5. This is enough to satisfy the
13 first prong of the test. The more important question is whether that belief was objectively
14 reasonable under the circumstances.

15 II. OBJECTIVELY REASONABLE

16 While Ortino concedes that the government did not *explicitly* inform him that he would
17 lose his job if he refused to cooperate in his OIG interview, the relevant question is whether it was
18 objectively reasonable for Ortino to think that the threat was *implied* under the circumstances.
19 *Murphy*, 465 U.S. at 435. According to Ortino, DiNucci’s instructions leading up to the interview
20 and DHS’ rules and directives regarding OIG interviews confirm that Ortino reasonably believed
21 that he would lose his job if he did not answer the agents’ questions. Mot. 11. Accepting Ortino’s
22 version of the facts for purposes of this motion, I find that it was not objectively reasonable for
23 him to think that he was compelled to cooperate. The DHS OIG Directive explicitly states that
24 cooperation is not necessary if one is suspected of committing a criminal offense and nothing
25 DiNucci said to Ortino contradicted that regulation. Ortino had surrendered his service weapon,
26 was placed under arrest before the interview, and knew he was facing criminal consequences
27 before he decided to answer questions. He was not implicitly or explicitly compelled to do so.

28 Ortino argues that DiNucci directed him to come to the San Francisco Customs House on

1 April 2, 2019 to talk about the “Vann thing,” but only upon his arrival did he tell him the real
2 reason he was there was to talk to DHS OIG. Ortino Decl. ¶ 3. He claims that DiNucci instructed
3 him that he could not leave and ordered him to speak with DHS OIG and to tell them the truth. *Id.*
4 ¶ 4. He felt that he was not in the position to disobey these instructions because DiNucci “made
5 no reference to the DHS rule that would have allowed [him] to invoke his right to silence without
6 any penalty to his employment.” Mot. 11 (referring to the exception in the DHS Management
7 Directive 810.1 for those who are “subject of an investigation that can lead to criminal
8 prosecution”).³

9 DHS Management Directive 810.1 states that CBP cannot fire an employee for refusing to
10 answer questions from OIG when he or she is “the subject of an investigation that can lead to
11 criminal prosecution.” Urhausen Decl., Ex. L (stating that DHS employees will “[b]e subject to
12 disciplinary action for refusing to provide documents or information or to answer questions posed
13 by investigating officials or to provide a signed sworn statement if requested by the OIG, *unless*
14 *questioned as the subject of an investigation that can lead to criminal prosecution.*”) (emphasis
15 added). Ortino claims that DiNucci told him to tell the truth, but that does not implicitly compel
16 him to testify. The Supreme Court has contrasted an order merely to be “truthful,” which does not
17 compel testimony, with an order to “cooperate,” which demands more of the reasonable employee.
18 *Murphy*, 465 U.S. at 437 (observing that “Murphy’s probation condition [to be truthful] proscribed
19 only false statements”). Nothing DiNucci did contradicts the DHS Directive or the *Garrity* rule.

20 Ortino does not deny that he surrendered his service weapon and was placed under arrest
21 before the agents began questioning him. Ortino Decl. ¶ 4 (“At some point in the discussion,
22 [DiNucci] told me to give him my service belt, including my service weapon, and I gave it to
23 him.”); *see also id.* ¶ 5 (“I waited approximately 45 minutes in Director DiNucci’s office.

24 _____
25 ³ The government contests these allegations. DiNucci claims that he never told Ortino that he had
26 to cooperate with DHS OIG and never threatened to punish Ortino if he did not cooperate with
27 DHS OIG. DiNucci Decl. ¶ 9. He claims that he “explicitly told [Ortino] that he did not have to
28 talk if he did not want to do so and that it was his choice whether or not to talk to the OIG” and
that “if he did decide to talk he should tell the truth and that he should get a lawyer if he wanted
one.” *Id.* ¶ 10.

1 Director DiNucci then took me to a different room, where three agents were waiting. One of them
2 told me I was under arrest and read me my rights. After about 10 minutes, the OIG and DOL
3 agents arrived.”). He received a *Miranda* warning. He is a law enforcement officer who would
4 generally know the consequences of being arrested. It is not objectively reasonable, as the
5 government points out, that “although he was under arrest and facing a possible felony conviction
6 and prison term, he participated in his post-arrest interview, made inculpatory statements, and
7 jeopardized his freedom all because he thought that he would lose his job if he remained silent.”
8 Oppo. 12.

9 While there is no precedent directly on point, the reported case law supports the
10 government’s position. For example, in *United States v. French*, the court denied a police
11 officer’s motion to suppress statements made during two Federal Bureau of Investigations (“FBI”)
12 interviews regarding drug trafficking. 216 F. Supp. 3d 771, 776 (W.D. Tex. 2016), *aff’d*, 708 F.
13 App’x 205 (5th Cir. 2018). French had a brief conversation with his supervisors, who then
14 directed him to a conference room where FBI agents were waiting. *Id.* His supervisors told him
15 to “make himself available to the command staff and investigation.” *Id.* French testified that he
16 knew police officers generally cooperate with investigations. *Id.* One of the FBI agents
17 “specifically stated that the interview pertained to a criminal investigation.” *Id.* “No [police
18 department] personnel were present during the interview.” *Id.* Although his supervisors asked
19 him earlier to sign a document that required him to turn in his badge, firearm, and other police
20 equipment, French maintained possession of his firearm, baton and pepper spray throughout the
21 interview. *Id.* He testified that he did not think he was in custody during the interview. *Id.*
22 Several days after the first interview, FBI interviewed French again and administered a polygraph
23 examination. *Id.* Ultimately, the court found the circumstances made it clear that “French was not
24 faced with the Hobson’s choice of either making an incriminating statement or being fired.” *Id.* at
25 777 (internal quotation marks and citation omitted).

26 The circumstances in French’s first FBI interview closely match what Ortino claims
27 happened here. Both met with a supervisor, who then led them to interview with investigating
28 agents. Their supervisors were not present during the investigative interviews. Although French

1 actually maintained possession of his service weapons, he signed an affidavit and knew he would
2 be turning them in soon. Similarly, DiNucci instructed Ortino to turn in his service weapon. The
3 agent in French's interview specifically told him that it involved a criminal investigation. Ortino
4 was not only told that, but he was also placed under arrest on the criminal charges prior to the
5 interview. Like French, he did not face the Hobson's choice of either making an incriminating
6 statement or being fired.

7 Ortino's situation also differs from cases where courts have granted motions to suppress
8 under *Garrity*. Courts have found that a compulsion situation is created when investigative agents
9 imply that they can help defendants save their jobs if they cooperate. *See, e.g., Zeigler v. State*,
10 350 Ga. App. 716, 723 (2019) (granting motion to suppress statements made after agents said they
11 were "trying to help" defendant save her job); *State v. Socarras*, 272 So.3d 488, 495 (Fla. Dist. Ct.
12 App. 2019) (granting motion to suppress statements made after agent said "we have to make this
13 look like an isolated incident if you want to try to maintain your position in narcotics"). It can be
14 created more explicitly. *See State v. Graham*, 136 Ohio St. 3d 125 (2013) (granting motion to
15 suppress where defendants received a "Notice of Investigatory Interview" beforehand that
16 informed them that their refusal to cooperate could subject them to discipline); *State v. Aiken*, 281
17 Ga. App. 415, 418, (2006), *aff'd*, 282 Ga. 132 (2007) (granting motion to suppress where
18 defendant, who worked as a state probation officer for 17 years, was given a "Notice of Interfering
19 with On-Going Internal Investigation" that stated he was required to participate or face
20 disciplinary action).

21 Ortino does not allege that agents compelled him to speak. Indeed, Agent Roberson states
22 that she informed him "several times that he did not have to continue his post-arrest interview or
23 answer [their] questions and that he could call an attorney," but he "always voluntarily chose to
24 continue his interview." Roberson Decl. ¶ 7; *see also* Urhausen Decl., Ex. J (DOL interview
25 report of Ortino stating that he signed a Miranda waiver to continue the interview, refused having
26 an attorney present several times, and stated that he "just wants to be honest").⁴

27
28 ⁴ Ortino asserts that his *Miranda* warnings were insufficient and that he should have received
Garrity warnings as well. It is true that the *Garrity* court itself found that a *Miranda* warning is

1 Ortino also argues that as a long-time CBP employee, he was “well aware that if an
2 employee was asked to talk to OIG, that employee was expected to cooperate. If an employee
3 does not cooperate with OIG, he knew that he or she can be disciplined, up to and including
4 termination.” Mot. 11. That may well be his subjective belief, but the DHS policies Ortino refers
5 to are to the contrary; employees who are the subject of a criminal investigation are not required to
6 cooperate.

7 While Ortino concedes that the DHS policies contain Management Directive 810.1, he
8 contends that there is “no reason to conclude that [he] and other employee witnesses in this case
9 would in the ordinary course know about *Garrity*, or DHS’ articulation of *Garrity*.” Reply in
10 Support of Motion to Suppress [Dkt. No. 34] 7. He points out that other employees in this
11 investigation received the *Garrity* warning, showing that DHS OIG knew employees would not
12 know about *Garrity* in the ordinary course. *Id.* But they were not in custody or subject to an
13 investigation that may lead to criminal prosecution. In fact, “[a]ccording to CBP records, since
14 2010, CBP has not fired anybody for refusing to cooperate with a DHS OIG or a CBP Office of
15 Professional Responsibility investigation.” Roberson Decl. ¶ 12. Ortino can point to no fact that
16 shows that the government by implication required him to testify.

17 Ortino analogizes to *United States v. Goodpaster*, where the district court suppressed
18 statements a United States Postal Service (“USPS”) employee made to OIG who was investigating
19 theft of parcels containing prescription drugs. 65 F. Supp. 3d 1016, 1019 (D. Or. 2014). The day
20 before the OIG interview, a grand jury indicted Goodpaster for two counts of mail theft; it was
21 contested whether the OIG agents told Goodpaster he had been indicted during the interview. *Id.*
22 Before the interview began, OIG agents gave Goodpaster his *Miranda* warnings but did not
23 provide *Garrity* warnings. *Id.* at 1020. During the interview, OIG agents “described to
24 Goodpaster the evidence they had amassed against him, including the video evidence,” and

25
26 insufficient to dispel the compulsion inherent in the employment penalty for silence. *Garrity*, 385
27 U.S. at 494. But defendants seeking to suppress statements taken in violation of *Garrity* are
28 required to prove that they had both a subjective and objectively reasonable belief that they were
compelled to answer under the threat of termination. Ortino has not met that burden here.

1 “informed Goodpaster of the consequences of his thefts on other veterans who needed their
2 prescription medicines.” *Id.* Goodpaster confessed that he stole packages from the mail and wrote
3 a written statement of his confession, after which he was handcuffed and placed under arrest. *Id.*

4 There are two significant distinctions between the facts in *Goodpaster* and this case. The
5 USPS OIG guide in *Goodpaster* provided that USPS employees are to “cooperate” in USPS OIG
6 investigations. It did not provide an exception for employees who were the subject of a criminal
7 investigation, unlike the DHS OIG regulation. *Goodpaster*, 65 F. Supp. 3d at 1020. Further,
8 when Goodpaster was initially hired by USPS, he signed a document acknowledging that he
9 understood that if he violated USPS’s policy to “cooperate” in OIG investigations he could be
10 subject to administrative discipline. *Id.* The court found this dispositive in making Goodpaster’s
11 belief that he would be fired if he failed to answer questions objectively reasonable. The state
12 created a penalty situation and did not provide an assurance that adequately retracted its prior
13 threat. *Id.* at 1031.

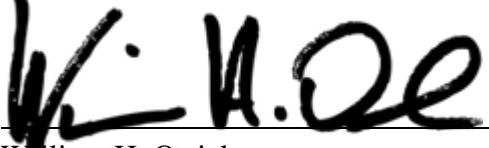
14 Ortino was not under a duty to cooperate. He was not given some type of notice before the
15 interview that would make it objectively reasonable for him to think he was compelled to answer
16 under threat of termination; Management Directive 810.1 was to the contrary. He was under arrest
17 and knew he had the right not to incriminate himself. While Ortino may have had a subjective
18 belief that he had to answer questions or face termination, the government did nothing by
19 implication to require his testimony. His belief that he was compelled to answer DHS OIG
20 agents’ questions was not objectively reasonable. A *Garrity* warning was not necessary in
21 addition to the *Miranda* warning.

22 CONCLUSION

23 Accordingly, Ortino’s motion to suppress statements and derived evidence is DENIED.

24 **IT IS SO ORDERED.**

25 Dated: December 3, 2019

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William H. Orrick
United States District Judge